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Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

BARRY L. RIDER, KENNETH L. CHARLES, ALAN L. FOUST, STEPHEN ELLIS, STEPHEN F. KEEN, RONALD E. LARISON, JOSEPH P. MARKLEY, DONALD R. MILLER, JR., BLAINE L. SINGER, CLARE SMITH, Executrix of the Estate of Leonard Smith, LaRUE D. SMITH, DANIEL H. THOMAS, BLAINE A. TRUTT, JOHN THOMAS WILLIAMS, and JON F. VETTER, Individually and on behalf of all others similarly situated,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA; GLENN R. JEFFES, Commissioner of PA Bureau of Corrections; PENNSYLVANIA BUREAU OF CORRECTIONS; ANN M. GOOLSBY, Superintendent of Muncy Correctional Institution; J. L. ANDREWS, Personnel Officer of Muncy Correctional Institution; JOHN D. MILLETT, Executive Director PA Civil Service Commission; PENNSYLVANIA CIVIL SERVICE COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

WHETHER 28 U.S.C. § 1738 PRECLUDES AN INDIVIDUAL TITLE VII ACTION WHERE THE APPELLATE STATE COURT OPINION RELIED UPON IS RENDERED NOT IN THE CONTEXT OF ENFORCEMENT OF STATE DISCRIMINATION LAW, BUT IN THE CONTEXT OF COMMON LAW ARBITRAL REVIEW WHICH PERMITS ONLY A DETERMINATION THAT THE ARBITRATOR HAS MISCONSTRUED THE CONTRACTUAL INTENTIONS OF THE PARTIES AND RESULTS IN A DECISION WHICH IS IN DIRECT CONFLICT WITH FEDERAL LAW.

TABLE OF CONTENTS

QUESTION PRESENTED----------i

TABLE OF AUTHORITIES----------ii

OPINIONS BELOW----------3

JURISDICTION----------4

STATUTE INVOLVED----------6

STATEMENT OF THE CASE----------7

REASONS FOR GRANTING THE WRIT----------22

I. WHETHER A FEDERAL COURT MAY ACCORD PRECLUSIVE EFFECT TO A STATE COURT'S VACATION OF AN ARBITRATION AWARD IN A CASE SUBSEQUENTLY BROUGHT UNDER TITLE VII IS AN ISSUE OF GREAT IMPORTANCE WHICH HAS NOT BEEN RESOLVED BY THIS COURT. ----------22

II. CAN A BFOQ DETERMINATION WHICH IS FAR BROADER THAN THAT INVOLVED IN FEDERAL LAW BE USED TO PRECLUDE AN EMPLOYEE'S FEDERAL TITLE VII CLAIM? ----------41

CONCLUSION----------47

TABLE OF CONTENTS CONTINUED

APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit dated June 23, 1988 ----------1a

Judgment of the United States District Court for the Middle District of Pennsylvania, dated June 22, 1987 ----------58a

Order of the United States District Court for the Middle District of Pennsylvania, dated June 22, 1987 ----------59a

Order of the United States District Court for the Middle District of Pennsylvania, dated May 20, 1987 ----------64a

Opinion and Order of the Commonwealth Court of Pennsylvania, dated September 30, 1986 ----------77a

Judgment of the United States Court of Appeals for the Third Circuit, dated June 23, 1988 ----------92a

TABLE OF AUTHORITIES

Cases

Alexander vs. Gardner-Denver Co.,
415 U.S. 36, 56-60
(1974)---------- 22, 38, 39, 45

Barrentine vs. Arkansas-Best Freight
System, Inc.,
450 U.S. 728, 740-746
(1981)---------- 22

Com. Dept. of Corrections vs. Am. Federation,
101 Pa.Cmwlth. 121, 515 A.2d
1000 at 1000 (1986)
--------- 12, 13, 14, 17, 33, 35, 42, 44

Dothard vs. Rawlinson,
433 U.S. 321
(1977) ---------- 41, 42, 44

Griffin vs. Michigan Dept. of
Correction, 654 F.Supp. 690
(E.D.Mich. 1982) ---------- 42

Gunther vs. Iowa State Men's Reform,
612 F.2d 1079
(8th Cir. 1980) ---------- 42

Kent vs. Johnson,
821 F.2d 1220
(6th Cir. 1987)---------- 42

TABLE OF AUTHORITIES CONTINUED

Kremer vs. Chemical Const. Corp.,
456 U.S. 461
(1982) --------24, 25, 26, 28, 30, 31, 46

Leechburg Area Sch. Dist. vs. Dale,
492 Pa. 515, 424 A.2d 1309,
1312-1313 (1981) ---------- 29

McDonald vs. City of West Branch, Mich.,
466 U.S. 284, 289
(1984) ---------- 22, 45

Pa. Soc. Serv. vs. Com. Dept. of Labor,
105 Pa.Cmwlth. 264, 524 A.2d 1005
(1987) ---------- 29

Reynolds vs. New York State Dept.
of Correctional Service,
33 E.P.D. (CCH) ¶33
993 (S.D.N.Y. 1983) ---------- 45

Rider, et al. vs. Commonwealth
of Pennsylvania,
850 F.2d 982
(3d Cir. 1988)----------3, 19, 20

University of Tennessee vs. Elliott,
478 U.S. 788, 106 S.Ct. 3220 at
3225 (1986) ---------- 24

TABLE OF AUTHORITIES CONTINUED

U.S. vs. Gregory,
818 F.2d 1114 (4th Cir. 1987)-------- 42

Statutes

28 U.S.C. § 1738 ---------i, 6, 17, 19, 25, 26
§ 1254(1) ---------- 5

42 U.S.C. § 2000e ---------- 4
§ 2000e-2(e) ---------- 41
§ 2000e-5(b) ----------24, 27

Rules

Federal Rule of Civil Procdure
Rule 12(b)(6) ---------- 17
Rule 54 (b) ---------- 18

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Respondents

PETITION FOR A WRIT OF CERTIORARI
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The Petitioners, Barry L. Rider, Kenneth L. Charles, Alan L. Foust, Stephen Ellis, Stephen F. Keen, Ronald E. Larison, Joseph P. Markley, Donald R. Miller, Jr., Blaine L.

Singer, Clare Smith, Executrix of the Estate of Leonard Smith, LaRue D.Smith, Daniel H. Thomas, Blaine A. Trutt, John Thomas Williams and Jon F. Vetter, Individually and on behalf of others similarly situated, hereby petition that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Third Circuit entered in this case on June 23, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 850 F.2d 982, and is reprinted in the Appendix hereto, p. 1a, *infra*.

The Memorandum Opinion Orders of the United States District Court for the Middle District of Pennsylvania (Muir, D.J.) have not been reported. The Opinion Order of June 22, 1987 is reprinted in the Appendix hereto, p. 59a. The Opinion Order of May 20, 1987 is reprinted in the Appendix hereto, p. 64a.

JURISDICTION

Invoking federal subject matter jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Petitioners brought this suit in the Middle District of Pennsylvania. On May 20, 1987, the Middle District granted Defendants' Motion to Dismiss Plaintiffs' claim under Title VII. See, p. 64a, infra. On June 22, 1987, the Middle District entered judgment in favor of the Defendants and against the Plaintiffs on Plaintiffs' claims under Title VII. See, p. 58a, infra.

On Petitioners' appeals, the Third Circuit on June 23, 1988, issued an Opinion and Judgment upholding the District Court's Order of June 22, 1987, dismissing Petitioners' Title VII claims. See, p. 1a, infra. No Petition for Rehearing was sought.

This Petition for a Writ of Certiorari was filed within 90 days of that date.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Act of May 26, 1790 Ch. 11, 1 Stat. 122, 28 U.S.C. § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

Petitioners are males all of whom are, or were, employed at SCI-Muncy, a medium security state prison at which both male and female prisoners are confined. The prison hires both male and female guards to monitor the inmates; however, regardless of the shift involved, the male housing units are staffed only by male guards, and female housing units are staffed only by female guards. Female inmates are not housed in cellblocks, but live in large, two-story housing units. Female inmates live in rooms which accommodate two inmates and which contain a separate toilet. Each floor has a shower room with two or three separate shower stalls and each building has at least one recreation room. The male inmates reside in two single-story structures, each with a large open room containing numerous beds, a shower

room with several showers, and a small recreation area.

The prison also maintains a Restrictive Housing Unit for male and female inmates who have caused or may cause disturbances within the institution. The Restrictive Housing Unit is staffed with four to six correction officers who are male or female, and a Sergeant, which Sergeant position is designated as being available only to female applicants. Prior to the posting of this Sergeant position as "female only," men did perform the job as Restrictive Housing Unit Sergeant without any infirmity or problem. Other assignments designated "female only," are: Yard Sergeant, Wilson Infirmiry, Escort, Visiting Room, Admissions, and Property.

Decisions pertaining to the hiring of guards at SCI-Muncy are governed by: (1) the Collective Bargaining Agreement between the

American Federation of State, County and Municipal Employees (the "Union"), and the Commonwealth Department of Correction (the "Department"); and (2) a hiring policy statement issued by the Department. Article 30, Section 10 of the Collective Bargaining Agreement directs that all hiring decisions be made on the basis of seniority "unless the employer feels it is necessary to assign otherwise in order to protect the efficiency of operation." In addition, Article 33 of the Collective Bargaining Agreement provides that the employer and the Union agree not to discriminate against any employee on the basis of sex. These provisions of the Collective Bargaining Agreement are augmented by the Department's hiring policy guidelines, which state:

> a. Guards will not be assigned to work in open view of unclothed inmates of the opposite sex;

b. External escort of prisoners must be by at least one officer of the same sex;

c. Assignments to housing units will involve at least one officer of the same sex as the inmates; and

d. Guards will not conduct strip or frisk searches of inmates of the opposite sex except in case of emergency.

These guidelines do not form part of the collective bargaining agreement between the parties.

Under these hiring guidelines, a number of the guard assignments at SCI-Muncy have been designated as being available only to female applicants because the job descriptions would violate one or more of the Department's hiring policy guidelines set forth above. The Pennsylvania Civil Service Commission empowered to designate these state jobs as being available only to females, designates, without investigation, any job which does not

comply with the Department's hiring policy guidelines as available to female applicants only. Thus, the Department's shift vacancy announcements at SCI-Muncy were labeled "C.O.I Vacancy - Female" and addressed to "All Female C.O.I's."

In response to the Department's refusal to allow male guards to enter bids for certain guard assignments, the Petitioners' Union filed two grievances alleging that the bargaining unit employees' seniority rights under the Collective Bargaining Agreement had been violated by the Department's designation of correctional officer shift assignments based on sex. After due progression through the prior steps in the grievance procedure, the matter was referred to an arbitrator selected by the Union and the Department. The Department argued that its consideration of the privacy rights of inmates permitted job

assignments based on sex. The arbitrator found it unnecessary to review any of the certified positions because he found as a matter of federal law that privacy interests of inmates could never justify an exception to the general prohibition of discrimination on the basis of sex.

The Department appealed the arbitrator's award to the Commonwealth Court of Pennsylvania. The Commonwealth Court vacated the arbitrator's award on the ground that it was not rationally derived from the terms of the Collective Bargaining Agreement. Com. Dept. of Corrections vs. Am. Federation, 101 Pa.Commw. 121, 515 A.2d 1000 (1986). (77a) The Court found that the arbitrator had exceeded his authority because he had reached his conclusion on the basis of an issue which was not involved in the case -- the balancing of the rights of inmates against the rights of

guards. The Commonwealth Court noted that the contract issue was limited to a determination of "whether the Department had a basis for deeming it necessary to depart from seniority 'in order to protect the efficiency of operation.'" Id., at 1002. Because the Court, under its standard of review, could not review the factual or legal correctness of the arbitrator's balancing of the rights of the inamtes against the rights of the guards, the Court's holding was necessarily that this determination was simply one not committed to arbitration. In support of this determination, the Court noted that it was the Department's legal responsibility to deal with its inmate population effectively, efficiently and humanely and that it was therefore "manifestly unreasonable to conclude that prison management could have intended to bargain away this responsibility." Prior to

the existence of the Collective Bargaining Agreement the Department was solely and legally responsible for exercising and for making a determination as to what vestige of human status as is embodied in personal privacy is to be accorded its inmate population. Id., at 1003. The Commonwealth Court held that it was manifestly unreasonable for the arbitrator to conclude that the terms of the agreement should be read in a manner which would include within the bargain the commission of this absolute responsibility to arbitral decision. The Commonwealth Court therefore, vacated the arbitrator's award because he had exceeded his authority under the Agreement.[1]

[1]There will likely be dispute between the Petitioners and the Respondents as to the meaning of the Commonwealth Court's decision and Petitioners have attempted to state the holding in a manner which, as will be discussed infra, comports with the Commonwealth Court's limited standard of review.

The Petitioners subsequently, after fulfilling all the procedural prerequisites, filed a Complaint in the United States District Court for the Middle District of Pennsylvania alleging that the Respondents had violated the provisions of Title VII. In their Complaint, Petitioners alleged that the State Civil Service Commission, the body charged with the responsibility of granting selective certification to various positions at SCI-Muncy, granted selective certification without an investigation and/or determination of whether or not a reasonable accommodation for male employees could be made as opposed to granting a blanket bona fide occupational qualification ("BFOQ") certification for all positions in the female housing units. Petitioners further alleged that use of the male guards would not pose a substantial problem directly linked to their sex; would

not pose a threat to inmates or control of the institution; would not undermine the guard's capacity to provide security within the institution and that even if privacy rights of inmates were a valid consideration. The Defendants have made no reasonable accommodations in those situations where the privacy of inmates could legitimately be a subject of concern. Petitioners further alleged that the Respondents retaliated and further discriminated against males by requesting selective certification of 18 new correctional officer trainee positions as "female." In order to justify this certification, Respondent Jeffes issued orders requiring strip searches to make it appear that the positions required female correctional officers. Petitioners also alleged that Yard Sergeants were also required to assist in searches to justify the selective

certification for the Yard Sergeants. Subsequent to the creation of the selectively certified positions, the entire strip search policy was rescinded.

In response to Petitioners' Title VII claim, Respondents filed a Motion to Dismiss asserting that the Commonwealth Court's decision in Com. Dept. of Corrections vs. Am. Federation, supra., under the provisions of 28 U.S.C. § 1738, precluded the Plaintiffs from challenging the sex-based hiring practices at Muncy under Title VII.

On May 20, 1987, the District Court issued an Order dismissing the male guards' Title VII claim pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that it was barred by res judicata as a result of a Pennsylvania Commonwealth Court judgment holding that the hiring of female guards to monitor female prisoners did not constitute unlawful

discrimination against the male guards. By Order dated June 22, 1987, the District Court granted the male guards' Fed.R.Civ.P. 54(b) motion and certified its Order dismissing their Title VII claim as final, thus making appeal to the Third Circuit possible.

In due course, Petitioners took appeal to the Third Circuit from the dismissal of their Title VII claim.

The Third Circuit thereupon addressed the issue of whether the Commonwealth Court's decision should be given preclusive effect with regard to the Petitioners' Title VII claim. After reviewing the facts of the case and the Commonwealth Court's decision, recognizing that it was never specifically held or stated that female gender is a BFOQ under Title VII principles for the positions sought by the male guards at SCI-Muncy, the Third Circuit held that

> Implicit in the Commonwealth Court's holding that the arbitrator's award was not rationally derived from the contract, was a finding that female gender falls within the "efficiency of the operation" exception to the seniority preference rule contained in Article 30, Section 10 of the Agreement and thus is a BFOQ for the positions advertised at SCI-Muncy.

Rider vs. Com. of Pa., 850 F.2d 982 (3d Cir. 1988), 19a.

The Third Circuit then analyzed whether under 28 U.S.C. § 1738 and the principles of issue preclusion the decision of the Commonwealth Court precluded consideration of Petitioners' Title VII claim. In its discussion, the Third Circuit noted that four essential elements must be present before issue preclusion may be applied: 1) the issue decided in the prior adjudication was identical with the one presented in the latter action, 2) there was a final judgment on the merits, 3) the party against whom the plea is

asserted was a party or in privity with a party to the prior adjudication, and 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. The Court addressed all the elements except whether there was identity of the persons, since it believed there was no dispute in this regard.

While the Commonwealth Court's own analysis never once mentions BFOQ or Title VII, the Third Circuit found identity of issues because "the Commonwealth Court grafted classic Title VII BFOQ analysis onto" its interpretation of the Agreement. Rider vs. Com. of Pa., 850 F.2d 982 (3d Cir. 1988); p. 35a. The Third Circuit therefore found identity of issues.

The Third Circuit found that there had been a full and fair opportunity to litigate

because it believed both the arbitrator and the intermediate appellate court sought to address the sole question of whether female gender was a BFOQ for the job vacancies in question.

On the issue of a final judgment on the merits, while recognizing that the sole issue before the Commonwealth Court was whether the arbitrator had exceeded his authority under the Agreement, the Third Circuit again relied upon a determination that the Commonwealth Court's judgment was in large part based upon an analysis of the BFOQ question. (p. 43a). The Court therefore found that there had been a final judgment on the merits.

REASONS FOR GRANTING THE WRIT

I. WHETHER A FEDERAL COURT MAY ACCORD PRECLUSIVE EFFECT TO A STATE COURT'S VACATION OF AN ARBITRATION AWARD IN A CASE SUBSEQUENTLY BROUGHT UNDER TITLE VII IS AN ISSUE OF GREAT IMPORTANCE WHICH HAS NOT BEEN RESOLVED BY THIS COURT.

The Court has repeatedly recognized that where Congress intended statutes such as Title VII to be judicially enforceable, arbitration cannot provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. McDonald vs. City of West Branch, Mich., 466 U.S. 284, 289 (1984); Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740-746 (1981); Alexander vs. Gardner-Denver Co., 415 U.S. 36, 56-60 (1974).

The following are among the factors which the Court determined to militate against

according preclusive effect to the arbitral process.

> 1. The decision upon the merits of the Plaintiffs' claim must be based solely upon the contract and the rule of law established by the Union and Employer's Collective Bargaining Agreement.
>
> 2. The fact-finding process is not equivalent to judicial fact-finding.
>
> 3. The individual making the factual and legal determinations upon the merits of the claim is skilled in the law of the shop and not the law of the land.
>
> 4. The Union has exclusive control over the manner and extent to which an individual grievance is presented.
>
> 5. According preclusive effect to arbitration awards would severely undermine the protection of federal rights that the statute is designed to provide.

The Court has also held that unreviewed determinations by state agencies charged with enforcing antidiscrimination laws should not

be given preclusive effect in an employee's subsequent Title VII action. University of Tennessee vs. Elliott, 478 U.S. 788, 106 S.Ct. 3220 at 3225 (1986). This determination in Elliott was based not upon any of the factors set forth with regard to arbitration, but was based upon the language of 42 U.S.C. § 2000e-5(b) which evidenced Congress's decision that other values outweighed the policy of according finality to state administrative fact-finding. Kremer vs. Chemical Const. Corp., 456 U.S. 461 at 470 n. 7 (1982).

However, in the context of adverse state agency decisions by the agency charged with enforcing antidiscrimination laws, the Court has held that such decisions if reviewed and upheld by a state court can be entitled to preclusive effect. Id.

In the present case, the Third Circuit has extended this Court's holding in Kremer and applied 28 U.S.C. § 1738 and preclusion principles to hold that an employee's individual Title VII claims may be precluded by state court review of a common law arbitration.

Whether and how this Court's decision in Kremer should be extended into the vastly different process of common law arbitration will have far-reaching effects upon collective bargaining agreements, the arbitration system as well as the enforcement scheme of Title VII, and is of such immediate and great importance to employees, unions, and employers that review of this case should be granted. A review of the Court's decision in Kremer and the fundamentally different area of labor arbitration will demonstrate why this area of the law needs definition by the Court.

In Kremer vs. Chemical Const. Corp., supra., the Court determined that a state court judgment affirming a decision, by the agency charged with enforcing state discrimination laws, that a claim of employment discrimination is unproved is entitled to be afforded preclusive effect under the rules governing 28 U.S.C. § 1738. In making this determination, the Court noted the following factors in support of its decision:

> 1. The state agency and the state court were concerned with one and only one issue, whether there was any merit to plaintiff's claim that he was terminated or not rehired because of age or religion.
>
> 2. Review by the state court was part of a state process which was intended under Title VII to play an integral role in the Congressional scheme.
>
> 3. The state court process involved had to meet with federal requirements.

4. Under Title VII, 42 U.S.C. § 2000e-5(b), the decisions of the state court process were intended to be afforded substantial weight.

5 The case involved a specific state statutory right, subject to state enforcement in a manner expressly provided for by the federal act.

6. The alleged discriminatory acts were prohibited by both federal and state laws.

7. The elements of the specific claim were virtually identical under state and federal law.

8. The decision reviewed directly decided that there was no reason to believe that the individual had been discriminated against.

9. The state court review necessarily decided that the claim was meritless under state law provisions which were virtually identical to those encompassed within Title VII.

The Court also took note of the fact that not only was a virtually identical claim reviewed in a process specifically charged with applying employment discrimination laws,

but that the fact-finding process statutorily mandated an independent investigation of the claim, a full and fair opportunity to litigate the claim and required that a determination be made that the evidence submitted by the claimant failed, as a matter of law, to reveal any merit to the discrimination complaint. Id. at 479-485. The Court noted that the procedures involved in the above administrative process and the state court review were in marked contrast to the type of fact-finding process involved in arbitration proceedings which are usually not equivalent to judicial fact-finding. Id. at 477-478.

In stark contrast to the administrative proceeding and state court review involved in Kremer vs. Chemical Const. Corp., supra. are the procedures and state court review involved in common law arbitration and review. Under common law arbitration, the type of fact-

finding process is, in essence, left to the individual determination of the chosen arbitrator. Further, state court review is limited to a determination as to whether the terms of the agreement encompass the subject matter of the dispute. Leechburg Area Sch. Dist. vs. Dale, 492 Pa. 515, 424 A.2d 1309, 1312-1313 (1981). Where the reviewing court makes such a determination, the arbitrator's award is vacated because he was without authority to enter the award in question. State court review is not and cannot be based upon a determination of an error of law or fact by the arbitrator. Pa. Soc. Serv. vs. Com. Dept. of Labor, 105 Pa.Cmwlth. 264, 524 A.2d 1005 at 1009 (1987). If an arbitrator makes a factual and legal determination concerning the existence or non-existence of discrimination, this determination is simply not subject to state court review. The only

manner in which this determination can be vacated upon review is by a finding that the arbitrator was without authority to make the factual or legal determination involved.

In contrast to Kremer,

1. There is no specific decision that the individual's claim was not a product of the discrimination alleged.

2. There is no requirement of an independent investigation applying laws virtually identical to the federal act.

3. There are no defined procedures and the enforcement procedures are determined solely by the bargain between the Union and the Employer.

4. There is no requirement of a public hearing and the hearing and its procedures are determined solely by the individual arbitrator.

5. There are no provisions for appeal concerned with the merits of the claim.

6. The procedure was never intended to be part of the

enforcement scheme of Title VII or even state discrimination laws.

7. There is no application in the process of identical state and federal laws but rather the law of the contract as reflected by the bargain between the parties prevails.

8. The actual judgment of the reviewing court does not address and cannot address whether the specific claims of discrimination are meritless.

Petitioners submit that the fundamental differences between the legal processes involved in Kremer and common law arbitration demonstrate the dangers involved in grafting the decision in Kremer onto federal court review of a state common law arbitration.

Turning to a brief review of the facts in the present case, by the terms of the Collective Bargaining Agreement, an arbitrator was chosen by the union and the employer. The arbitrator then held a one-day hearing at which a union representative and a

representative of the employer presented their respective cases. An opinion was subsequently issued, in which the arbitrator, applying federal law, held that privacy rights of inmates could never be a justification for a BFOQ exception to the general prohibition of discrimination on the basis of sex. The arbitrator never made any determination as to whether the specific jobs at issue in the individual employee's grievances were such that the privacy rights of inmates did not require individuals of a given sex to perform the job responsibilities.

The employer subsequently appealed the arbitrator's award to the Commonwealth Court of Pennsylvania which framed the issue before it as follows:

> Where a labor arbitrator's award requires a state correctional institution to make all prison guard shift assignments without regard to the gender of the prison guards and hence regardless of the

> personal privacy of inmates in the presence of guards of the opposite sex, is the arbitrator's award invalid as not rationally derived from the essence of the provisions of the collective bargaining agreement relating to the prison's operation?

Com. Dept. of Corrections vs. Am. Federation, 101 Pa.Cmwlth. 121, 515 A.2d 1000 at 1000 (1986). The Commonwealth Court quite properly recognized that it could not challenge the legal or factual determinations of the arbitrator's award, but could merely determine that the award could not be derived from the agreement and that, therefore, the arbitrator was without authority to make his factual and legal determinations. The Court then noted that the grievances involved the alleged failure of the employer to allow bids for shift preferences in accordance with Article 30, Section 10 of the Collective Bargaining Agreement which states:

> In making shift assignments to shift openings, preferences shall be granted on a seniority basis unless the employer feels it is necessary to assign otherwise in order to protect the efficiency of operation. Seniority status in this regard shall be Classification seniority attained at the work site.

In discussing the arbitrator's determination that the privacy rights of inmates could not be used as a basis for an exception to the general prohibition of discrimination on the basis of sex, the Court stated:

> In so doing, the arbitrator departed from a sound articulation of the issue as noted above, and reached his conclusion on the basis of a different issue, balancing the rights of inmates against the rights of guards - which is not involved in the case. The interpretation issue for the arbitrator here was, as he initially recognized, whether the department had a basis for deeming it necessary to depart from seniority "in order to protect the efficiency of operation."

Id. at 1002. The Court went on to hold that because the prison officials historically had a responsibility to accord the prisoners some minimal degree of personal privacy that "it is manifestly unreasonable to conclude that prison management could have intended to bargain away its absolute responsibility to accord to prisoners such a vestige of human status as is embodied in personal privacy." Id. at 1003.

In so holding, the Court did not engage in any analysis of whether any of the specific jobs required individuals of a given sex to accord prisoners some undetermined minimal degree of personal privacy. In fact, the analysis of the Commonwealth Court, contained in the last page of its opinion, never mentions the term BFOQ or makes any reference to Title VII or comparable state discrimination law. Rather, the Court simply

found that it was unreasonable to read the agreement to hold that the prison officials intended to bargain away any consideration of the inmates' minimal degree of personal privacy. It must be remembered, that the Court was vacating an arbitrator's award which interpreted the agreement as requiring all prison guard assignments to be made regardless of any personal privacy consideration of inmates.

Despite the extremely narrow scope of the state court's review power, the Federal District Court and Third Circuit held that not only did the Commonwealth Court review whether the arbitrator had properly applied the principles of contract interpretation, but the Commonwealth Court engaged in an independent analysis of whether sex was a BFOQ under Title VII for the jobs in question. They made this holding despite the fact that the Commonwealth

Court specifically found that the arbitrator's pursuit of traditional Title VII BFOQ analysis exceeded his authority under the agreement and despite the fact that the review powers of the Commonwealth Court do not permit independent factual or legal analysis of the merits of the claim.

What the above demonstrates is the extreme difficulties engendered in granting preclusive effect to review of a common law arbitration award. First, if the Collective Bargaining Agreement properly involves the type of determination on the merits of an employee's discrimination claims, these factual and legal determinations cannot be reviewed by the appellate court. Second, if the arbitration decision improperly involves the determination on the merits of the sex discrimination claim, because such a review on the merits was not contracted for, the state

court can merely vacate the award as being entered without authority. Third, if the reviewing court finds that the arbitrator was without authority to engage in his Title VII analysis and then exceeds its authority and engages in its own Title VII analysis, the employee may be precluded from review of this decision since the initial determination by the court formed a proper basis for the vacation of the award. Finally, in all these circumstances, the decision will be made in circumstances where

> The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures, to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath are often severely limited or unavailable.

Alexander vs. Gardner-Denver Co., supra., at 57-58.

The creation of a rule which would generally permit preclusion will not only denigrate the type of enforcement scheme envisioned by the provisions of Title VII, but it will adversely affect the arbitration system as well. Knowing that the arbitration process cannot adequately protect their rights under Title VII, employees, if they wish a fair decision on the merits, will necessarily elect to bypass the arbitration and institute a lawsuit. "The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, and not less." Alexander vs. Gardner-Denver, supra, at 59.

Because of the importance of this issue to all employees subject to collective bargaining agreements involving arbitration, Petitioners submit that it is of great importance to have this Court decide what, if

any, preclusive effect should be granted to state court review of arbitration decisions.

II. CAN A BFOQ DETERMINATION WHICH IS FAR BROADER THAN THAT INVOLVED IN FEDERAL LAW BE USED TO PRECLUDE AN EMPLOYEE'S FEDERAL TITLE VII CLAIM?

In Dothard vs. Rawlinson, 433 U.S. 321 (1977), the Court long ago recognized that if the exception was not to swallow the rule, the BFOQ exception under Title VII, 42 U.S.C. § 2000e-2(e), must be "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Id. at 334. Because of this extremely narrow reach of the BFOQ exception, federal courts in the context of sex discrimination for the position of prison guard have entered into detailed analyses of the prisons and held

> ...[the prison] must demonstrate why it cannot reasonably rearrange job responsibilities within the prison in order to minimize the clash between the privacy interest of the inmates and the safety of the prison employees on the one hand and the non-discrimination

requirement of Title VII on the other.

U.S. vs. Gregory, 818 F.2d 1114 at 1118 (4th Cir. 1987), see also, Kent vs. Johnson, 821 F.2d 1220 (6th Cir. 1987); Gunther vs. Iowa State Men's Reform, 612 F.2d 1079 (8th Cir. 1980); Griffin vs. Michigan Dept. of Correction, 654 F.Supp. 690 (E.D.Mich. 1982).

Despite the statement in Dothard, and the body of law recognizing the narrowness of the BFOQ exception, the holding by the state court in the present case, to the extent any such holding was actually made, is necessarily based on a determination that prison officials may solely determine when and if the privacy interests of prisoners warrant a BFOQ exception.

In Com. Dept. of Corrections vs. Am. Federation, 100 Pa.Cmwlth. 121, 515 A.2d 1000 (1986), the Commonwealth Court, according to the Third Circuit's opinion in the present

case, determined that sex was a BFOQ for the guard positions and that this determination precluded the Petitioners' Title VII claims. As alleged in Plaintiffs' Complaint and set forth in the Statement of the Case, the BFOQ certifications in question are based solely upon the unreviewed determination of the prison authorities. This determination involves no legitimate attempt to reasonably accommodate employees of the other sex and BFOQ certifications are manipulated to assure that only female guards are employed in the female housing units. Further, neither the employees nor the Union has any right to be involved in the process by which the prison authorities certify guard positions.

It must be understood that the Commonwealth Court never engaged in any review of the individual claims and specifically found that the arbitrator's attempt to balance

the rights of the inmates against the rights of the guards was improper. Therefore, if the Commonwealth Court's decision is to preclude the specific claims contained in Petitioners' Federal Complaint, it must be acknowledged that the prison authorities have an unassailable right to determine which specific jobs are subject to BFOQ certification. Stated in terms of the decision actually rendered by the Commonwealth Court, inmate privacy is a BFOQ if under the parties' Agreement "the employer feels it is necessary to protect the efficiency of operation." Id. at 1002.

Such a broad interpretation of a BFOQ is in direct conflict with this Court's opinion in Dothard and the body of case law cited above. Further, there can be little argument that a state system which left enforcement of discrimination law to arbitration and the type

of state court review involved in the present case would never represent an approved plan under Title VII. Finally, to the extent this decision of the Commonwealth Court is based upon the terms of a collective bargaining agreement, it is in direct conflict with this Court's long-standing recognition that

> "[t]he rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount Congressional purpose behind Title VII." Gardner-Denver, supra., 415 U.S., at 51, 94 S.Ct., at 1021.

McDonald vs. City of West Branch-Mich., 466 U.S. 284 at 292 n. 12 (1984).

In Reynolds vs. New York State Dept. of Correctional Services, 33 E.P.D. (CCH) ¶33, 993 (S.D.N.Y. 1983), the Court specifically addressed whether a BFOQ decision under New York law, which law contained a narrower BFOQ exception than federal law, should be granted preclusive effect in a subsequently filed

Title VII action. The Court held that even under this Court's decision in Kremer, it would be improper to preclude a Title VII claim because it was quite likely that the Plaintiff's federal claim would succeed under the narrower BFOQ exception contained in Title VII. The Court therefore held

> Given these circumstances, the Court does not believe that Kremer mandates dismissal of this action. Such a result would be inequitable, especially since the plaintiff could not raise her federal claims in the state proceedings.

Id. at 31, 710.

Petitioners submit that even if a BFOQ determination was made by the state court, it is important for this Court to determine what effect such a BFOQ determination will have where federal law requires a far different determination to be made with regard to the existence of a BFOQ and federal law applies a far narrower BFOQ exception.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and, upon review, the judgment of the Court of Appeals for the Third Circuit should be reversed.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5492

RIDER, Barry L., CHARLES, Kenneth L., FOUST, Alan L., ELLIS, Stephen, KEEN, Stephen F., LARISON, Ronald E., MARKLEY, Joseph P., MILLER, Donald R. Jr., SINGER, Blaine L., SMITH, Clare, Executrix of the Estate of Leonard Smith, SMITH, LaRue D., THOMAS, Daniel H., TRUTT, Blaine A., WILLIAMS, John Thomas and VETTER, Jon F., individually and on behalf of all other similarly situated,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; JEFFES, Glenn R., Commissioner of PA Bureau of Corrections; PENNSYLVANIA BUREAU OF CORRECTIONS; GOOLSBY, Ann M., Superintendent of Muncy Correctional Institution, ANDREWS, J.L., Personnel Officer of Muncy Correctional Institution, MILLETT, John E., Executive Director PA Civil Service Commission; PENNSYLVANIA CIVIL SERVICE COMMISSION

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C.No. 86-1536)

Argued Friday, January 8, 1988

BEFORE: SEITZ, SCIRICA and
GARTY, Circuit Judges

(Opinion filed June 23, 1988)

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OPINION OF THE COURT

GARTH, Circuit Judge:

Barry L. Rider and fourteen other male prison guards (referred to collectively as "the male guards") commenced this action against the Commonwealth of Pennsylvania and state agencies and officials challenging the hiring of only female guards for certain guard positions at the State Correctional Institution in Muncy, Pennsylvania, as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"), the Equal Pay Act, 29 U.S.C. § 206 et seq., 42 U.S.C. § 1983, and Pennsylvania state law. The district court dismissed the male guards' Title VII claim pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that it was barred by res judicata as the result of a

Pennsylvania Commonwealth Court judgment holding that the hiring of female guards to monitor female prisoners did not constitute unlawful discrimination against the male guards.[1] We will affirm.

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[1]By order dated June 22, 1987, the district court granted the male guards' Fed.R.Civ.P. 54(b) motion and certified its order dismissing their Title VII claim as final, thus making this appeal possible. We note that the district court did not fully comply with this court's certification requirements as set forth in Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 366 (3d Cir. 1975) (in granting a Fed.R.Civ.P. 54(b) motion, the district court must "specify those factors upon which it relied in granting certification and, thereby.... furnish us with the benefits of its analysis in marshalling the relevant factors..."). The district court here justified its Fed.R.Civ.P. 54(b) orders solely on the ground that the Title VII claim was the "major claim in this lawsuit." App. at 106. We do not view the district court's certification as fully complying with Allis-Chalmers Corp.'s requirements, but we will nevertheless address the issues on appeal. We shall, however, be less generous in accepting such certifications in the future, and will insist upon district courts adhering closely to the requirements which we specified in Allis-Chalmers Corp.

I.

A.

The State Correctional Institution at Muncy, Pennsylvania ("SCI-Muncy") is a medium-security prison and the only facility in the Commonwealth's correctional system that houses both male (140) and female (400) inmates. Because SCI-Muncy is not a maximum-security facility, both the male and the female prisoners reside in housing units. Female inmates live in rooms which accommodate two inmates and which contain a sink and a toilet. Female inmates are required to share communal showers located on each floor of each house. Male inmates, on the other hand, are housed in single story units, each with a large common dormitory room containing numerous beds, a communal shower area, and a small recreational area. In addition to these living arrangements, the prison maintains a

restricted housing unit for both male and female inmates who have caused, or may cause, disturbances within the institution.

Because inmates of both sexes are incarcerated at the facility, SCI-Muncy hires both male and female guards to monitor the inmates. As of October 27, 1986, the date on which the male guards filed their complaint, the male housing unit was staffed by male guards and the female housing unit by female guards. The restricted housing unit was staffed by four to six guards of both sexes, and a woman sergeant.[2]

Decisions pertaining to the hiring of guards at SCI-Muncy are governed by: (1) a

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[2]The record does not disclose the living arrangements or physical characteristics of the restricted housing unit. We are therefore unable to determine the degree to which inmates housed in this unit are, or might be, monitored by guards of the opposite sex. No issue pertaining to restricted housing units is before us in this appeal.

collective bargaining agreement between the American Federation of State, County and Municipal Employees (the "Union") and the Commonwealth's Department of Correction (the "Department"); and (2) a hiring policy statement issued by the Department. Article 30, Section 10 of the collective bargaining agreement direct that all hiring decisions be made on the basis of seniority:

> In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it is necessary to assign otherwise in order to protect the efficiency of operation. Seniority status in this regard shall be classification seniority attained at the work site.

In addition, Article 33 of the collective bargaining agreement specifically proscribes employment discrimination:

> Both the Employer and the Union agree not to discriminate against any employee on the basis of race,

> creed, color, ancestry, sex, marital status, age, national origin, non-job related handicap or disability, union membership or political affiliation.

These provisions of the collective bargaining agreement are augmented by the Department's hiring policy guidelines, which state:

> a. Guards will not be assigned to work in open view of unclothed inmates of opposite sex;
>
> b. External escort of prisoners must be by at least one officer or [sic.] the same sex;
>
> c. Assignments to housing units will involve at least one officer of the same sex as the inmates; and
>
> d. Guards will not conduct strip or frisk searches of inmates of the opposite sex except in case of emergency.

See Appellee's Brief at 7.

Under the hiring guidelines established by the Department--with the imprimatur of the

Pennsylvania Civil Service Commission[3]--a number of the guard assignments at SCI-Muncy have been designated as being available to female applicants only, notwithstanding the requirement in the collective bargaining agreement that all assignments be based upon seniority. Thus, in February of 1984, a number of the Department's shift vacancy announcements at SCI-Muncy were labeled "C.O.I. VACANCY--FEMALE" and addressed to "All Female C.O.I.'s.[4]

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[3]Under the Pennsylvania Civil Service Act, Pa.Stat.Ann. tit. 71 § 741.1 et seq. (Purdon 1962 & Supp. 1987), the Commonwealth's Civil Service Commission is empowered to designate certain state jobs as being available only to applicants who possess specific characteristics, such as gender, where it determines that possession of that characteristic is a prerequisite to carrying out the duties and responsibilities of the position.

[4]"C.O.I." appears to be an acronym for "Correctional Officer _____" The record does not disclose the meaning of the entire term.

B.

In response to the Department's refusal to allow male guards to enter bids for certain guard assignments, the Union filed two grievances claiming that SCI-Muncy had violated the provisions of the collective bargaining agreement that prohibit sex-based discrimination and that require that positions at the prison be filled on the basis of seniority unless the operational needs of the institution dictate otherwise. The grievances, after initial rejection by the Department, were heard by an arbitrator by mutual consent of the parties.

After considering both the Department's policy guidelines and the collective bargaining agreement, the arbitrator concluded that the vacancy announcements which were restricted to females, violated the provisions of the agreement. The arbitrator recognized

that the essential issue in the dispute was whether the gender-based distinctions drawn by SCI-Muncy were predicated on a "bona fide occupational qualification" ("BFOQ") and determined that they were not. See App. at 99. The arbitrator expressly rejected the Department's assertion that female prisons have a privacy interest in not being viewed by male guards when undressed or when performing intimate bodily functions.

In reaching this conclusion, the arbitrator relied primarily on Griffin v. Michigan Dept. of Corrections, 30 Fair Empl. Prac. Cas. (BNA) 638 (E.D.Mich. 1982). In Griffin, the district court rejected the prison management's claim that inmates had a right to privacy that created a BFOQ for guard assignments, stating:

> Defendant's [Department of Corrections] argument is without merit because (1) it assumes that inmates retain an unqualified

> protected right of privacy under the Constitution, and (2) it is based on a stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing of a member of one's own sex. Neither assumption can withstand traditional scrutiny.

Adopting the rationale of the district court in Griffin, the arbitrator in the instant case concluded that:

> Privacy rights of inmates is not a justification for a BFOQ exception to the general prohibition of discrimination on the basis of sex. It follows, therefore, that the Employer's attempt to draw a delicate balance between the inmates' rights of privacy and the employees' rights under the Agreement had no basis in law.[5]

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[5]It should be noted that the arbitrator acknowledged the Supreme Court's decision in Dothard v. Rawlinson, 433 U.S. 321 (1977), in which the Court refused to invalidate a state regulation which prohibited the hiring of female guards in contact positions at all male prisons, concluding that gender was a BFOQ in the circumstances of that case, which involved a danger of violence against women guards.

C.

In response to the arbitrator's disposition of the male guards' claim, the Department appealed to the Commonwealth Court of Pennsylvania. In Commonwealth Dept. of Corrections v. American Fed. of State, County and Municipal Employees, 101 Pa.Commw. 121, 515 A.2d 1000 (1986), the Commonwealth Court vacated the arbitrator's decision on the ground that it was not rationally derived from the terms of the collective bargaining agreement.

However, the Commonwealth Court framed its analysis in terms of whether gender was a BFOQ for the guard position in question:

> The key issue, as the arbitrator stated it at the outset, was whether the distinction made by the

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The arbitrator distinguished Dothard on the ground that it involved a special threat of violence to the female guards that was not present in the instant case.

> department in shift assignments was based upon a bona fide occupational qualification. Stated as a contract interpretation question, the issue is whether the department could depart from seniority as the sole criterion 'in order to protect the efficiency of operation.'

Commonwealth Dept. of Corrections, 101 Pa.Commw. at ____, 525 A.2d at 1001 (quoting Art. 30 § 10 of the collective bargaining agreement). After setting up its BFOQ analysis, the court cited Philadelphia v. Human Relations Commission, 7 Pa.Commw. 500, 30 A.2d 97 (1973) for the proposition that gender differences could be taken into account under certain circumstances where there were facts "justifying limiting personal contact under intimate circumstances to those of the same sex." 7 Pa.Commw. at 510 n.7, 30 A.2d at 103 n.7.[6]

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[6]In Philadelphia v. Human Relations Commission, 7 Pa.Commw. 500, 300 A.2d 97 (1973), the Commonwealth's Human Relations Commission brought an action against the City of Philadelphia, claiming that the City's Youth Study

The Commonwealth Court then determined that the arbitrator had gone beyond the confines of his role as an interpreter of the collective bargaining agreement:

> ... [in reaching his decision] the arbitrator departed from his own sound articulation of the issue, as noted above, and reached his conclusion on the basis of a

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Center's practice of restricting the supervision of its wards to those of the same gender constituted sex discrimination under the Pennsylvania Human Relations Act. The City asserted that the circumstances extant at the Center required that supervisory positions at the Center be allowed a BFOQ exception. In embracing the City's argument, the court stated that to subject a girl under the age of 17 to a "thorough search of her body by a male supervisor could cause not only a temporary traumatic condition, but also permanent irreparable harm to her psyche." 7 Pa.Commw. at 510, 300 A.2d at 102. The court also recognized that to have a woman supervisor "observe daily showers of the boys at a time in life when sex is a mysterious and often troubling force is to risk a permanent emotional impairment under the guise of equality." 7 Pa.Commw. at 510, 300 A.2d at 103. The court thus held that the City had adduced sufficient evidence to support its claim that a gender-specific BFOQ should be granted under the circumstances of that case.

> different issue-balancing the rights of inmates against the rights of guards--which is not involved in the case. The interpretation issue for the arbitrator here was, as he initially recognized, whether the department had a basis for deeming it necessary to depart from seniority 'in order to protect the efficiency of operation.' With respect to resolving that issue, the arbitrator strayed from the essence of this contract and from the issue at hand, to import into the case the philosophical views of a federal court, whose position is neither binding nor necessarily persuasive with respect to the law of this Commonwealth.

101 Pa.Commw. at ____, 515 A.2d at 1002 (quoting Art. 30 § 10 of the collective bargaining agreement) (emphasis added).

Having rejected the arbitrator's reliance upon Griffin, 30 Fair Empl. Prac. Cas. (BNA) 638, the Commonwealth Court proceeded to undertake its own interpretation of the collective bargaining agreement. The court found that the essence of the contract

involved the Department's "responsibility to deal with its inmate population effectively, efficiently and humanely." 101 Pa.Commw. at ____, 515 A.2d at 1003. Applying both the "rational derivation essence test" set forth in Philadelphia Housing Authority v. Union of Security Officers No. 1, 500 Pa. 213, 216, 455 A.2d 625, 627 (1983) and the "reasonableness language" test used in International Brotherhood of Firemen and Oilers v. School District of Philadelphia, 465 Pa. 356, 350 A.2d 804 (1976), the Commonwealth Court then determined that "it [was] manifestly unreasonable to conclude that prison management could have intended to bargain away its absolute responsibility to accord to prisoners such vestige of human status as is embodied in personal privacy." 101 Pa.Commw.

at ____, 515 A.2d at 1003.[7] Implicit in the Commonwealth Court's holding that the arbitrator's award was not rationally derived from the contract, was a finding that female gender falls within the "efficiency of the operation" exception to the seniority preference rule contained in Article 30, § 10 of the Agreement and thus is a BFOQ for the positions advertised at SCI-Muncy. Given the Commonwealth Court's initial characterization of the issue before it as a BFOQ question, see 101 Pa.Commw. at ____, 515 A.2d at 1001, its holding perforce recognized that female gender is a BFOQ with respect to the positions in question.

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[7]This decision is consistent with the New York Court of Appeals' recent affirmance in State Division of Human Rights v. Oneida County, 70 N.Y.2d 974 (1988), aff'g. 500 N.Y.S.2d 995 (1986, 4th Dept.), in which the court sustained the Appellate Division's holding that being a male is a BFOQ for a sheriffs position that involves monitoring male prisoners' toilet and shower facilities.

D.

In the wake of the Commonwealth Court's decision--and in lieu of an appeal to the Pennsylvania Supreme Court--the male guards brought the present action in the district court, claiming that the Department's gender-based hiring policy violated Title VII, 42 U.S.C. § 2000e et seq, the Equal Pay Act, 29 U.S.C. § 206 et seq, 42 U.S.C. § 1983, and Pennsylvania state law. Their complaint sought a declaratory judgment setting forth their rights as well as mandamus relief invalidating the Department's gender-based hiring policies. The complaint also requested injunctive relief, damages, costs, and attorneys fees. App. at 33-34.

The Commonwealth moved to dismiss the male guards' federal suit on the ground that it was precluded by the state court's decision in Commonwealth Dept. of Corrections, under

the doctrine of res judicata. The male guards opposed the motion to dismiss, arguing that the Commonwealth Court's decision did not constitute a decision on the merits of the federal claims and thus could not have preclusive effect.

The district court disagreed with the male guards' position and gave res judicata effect to the Commonwealth Court's judgment with respect to the Title VII count (Count II) of the male guards' complaint. The district court recognized that the issue before both the arbitrator and the Commonwealth Court was whether sex was a BFOQ for certain positions certified and advertised for females only at SCI-Muncy. App. at 98-99. With this characterization of the issue in mind, the court then applied the Supreme Court's holding in Kremer vs. Chemical Construction Corp., 456 U.S. 461 (1982), which

it construed as requiring the preclusion of the male guards' Title VII claim. In its May 20, 1987 Order of Dismissal, the district court stated: "Having carefully reviewed the Com._Dept._of_Corrections case we conclude that the Commonwealth Court could not have determined that the award of the arbitrator was not based on the essence of the collective bargaining agreement without also deciding that sex is bona fide occupational qualification for the positions certified and advertised for females only at Muncy." App. at 102. By Order dated June 22, 1987, the district court reaffirmed its dismissal of the male guards' Title VII claim and certified its judgment as final, pursuant to Fed.R.Civl.P. 54(b). See note 1 supra.

On appeal from that order, the male guards claim that the district court erred in granting the Commonwealth Court's motion to

dismiss pursuant to the doctrine of res judicata. They argue that the Commonwealth Court's decision should not have been given preclusive effect because: (1) the issues resolved by the state court were not identical to those presented to the district court; (2) the causes of action in the state and federal courts were not substantially the same; (3) they were not afforded a full and fair opportunity to litigate their Title VII claim in the state court; and (4) the state court decision did not constitute a judgment on the merits of their Title VII claim. The male guards also assert that in the Title VII context, the Supreme Court has expressly prohibited federal courts from giving preclusive effect to an arbitrator's award that is subsequently reviewed by a state court.

We are unconvinced by these arguments and thus will affirm the district court's dismissal of the male guards' Title VII claim.

II.

Federal law requires that "[t]he ... judicial proceedings of any court of any State... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State..." 28 U.S.C. § 1738. Thus, federal courts must "give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so[.]" Allen v. McCurry, 449 U.S. 90, 96 (1980). Accord University of Tennessee v. Elliot, 106 S.Ct. 3220, 3225 (1986); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 80 (1984). Because the district court in this case gave preclusive effect to

the decision of a Pennsylvania state court, our first task in reviewing the district court's order is to determine whether a Pennsylvania state court would similarly have dismissed the male guards' Title VII claim on res judicata grounds. See Gregory v. Chebi, No. 87-1222, slip op. at 11 (3d Cir. March 24, 1988); LaCourse vs. Firemen's Ins. Co., 756 F.2d 10, 12 (3d Cir. 1985).[8]

The related doctrines of res judicata and collateral estoppel are often relied upon by federal courts to preclude relitigation of issues that have previously been disposed of

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[8]Inasmuch as we do not sit as a court that reviews state court judgments, we express no opinion as to whether the Commonwealth Court's analysis and holding were correct. That determination was for a reviewing court in Pennsylvania to make. However, as we observed earlier, the male guards did not appeal the Commonwealth Court's ruling to the Pennsylvania Supreme Court.

in an earlier action. Res judicata precludes parties or their privies whose action has reached a final judgment on the merits, from relitigating issues "that were or could have been raised in that action." Allen v. McCurry, 449 U.S. at 94. Under collateral estoppel, on the other hand, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Id. Both doctrines are viewed as a means of reducing the "costs and vexation of multiple lawsuits." id., conserving judicial resources, facilitating judicial consistency, and "encourag[ing] reliance on adjudication." Id.; see Gregory, slip op. at 9; Davis v. United States Steel Supply, 688 F.2d 166, 174 (3d Cir. 1982) (in banc), cert. denied, 460 U.S. 1014 (1983);

Switlik v. Hardwicke Co., Inc., 651 F.2d 852 (3d Cir.), cert. denied, 454 U.S. 1064 (1981).

In an attempt to simplify the often confusing interchangeable use of the terms res judicata and collateral estoppel, this court recently has adopted the Supreme Court's and Second Restatement of Judgments' use of the terms "claim preclusion" and "issue preclusion:"

> Claim preclusion replaces 'res judicata' and encompasses both merger and bar principles in giving dispositive effect in a later action to a prior judgment. Issue preclusion now substitutes for 'collateral estoppel.' This preclusive device is somewhat more limited than claim preclusion because [it involves] relitigation only of an issue identical to that adjudicated in the prior action.

Gregory, No. 87-1222, slip op. at 9 (citing Migra, 465 U.S. at 77 n.1). See, Restatement (Second) of Judgments ch. 1 (1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4416 at 136 (1981).

See also Jackson Jordan, Inc. v. Plasser American Corp., 747 F.2d 1567 (Fed.Cir. 1984); Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530, 535-36 (5th Cir. 1978).

The district court's dismissal in this case turned on its belief that the Commonwealth Court had determined the issue that was dispositive of the male guards' Title VII claim, i.e., that female gender is a BFOQ for the positions sought by the male guards at SCI-Muncy.[9] Thus, our analysis will center on issue preclusion rather than claim preclusion.

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[9] Although we believe that the Commonwealth Court's conclusion that female gender is a BFOQ for the guard positions involved in this case is a factual finding, issue preclusion would apply even if it were alternatively viewed as a legal conclusion. See United States v. Stauffer Chem. Co., 464 U.S. 165, 170-71 (1984); McDonald v. City of West Branch, 466 U.S. 284, 287 N.5 (1984).

III.

Issue preclusion embodies the principle that "later courts should honor the first actual decision of a matter that has been actually litigated." C.Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4416, at 136 (1981). Accord N.L.R.B. v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31, 33 (1st Cir. 1987). As the Restatement of Judgments explains:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 at 250 (1982). By precluding a court from making a second determination as to an issue on which an earlier court has previously rendered a decision, the doctrine of issue preclusion assists in the "maintenance of the social

order" and "secure[s] the peace and repose of society by the settlement of matters capable of judicial determination." Southern Pacific Railroad v. United States, 168 U.S. 1, 48-49 (1897) (Harlan, J.).

Under Pennsylvania law, four essential elements must be present before issue preclusion may be applied: "1) the issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication ["identical parties"], and 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action." Safeguard Mut. Ins. Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975) (citing In Re: Estate of Ellis, 460 Pa. 281,

287, 333 A.2d 728, 731 (1975)). See Gregory v. Chebi, NO. 87-1222, slip op. at 9-10; Public Serv. Mut. Co. v. Cohen, 616 F.2d 704 (3d Cir. 1980); Melikian v. Corradetti, 791 F.2d 274, 277 (3d Cir. 1986) (applying New Jersey law).

Although the district court accurately stated the law of Pennsylvania with respect to issue preclusion see App. at 100, the district court did not systematically apply each of the necessary elements to the facts of the present case.[10] Instead, the district court appears to have assumed the existence of all of the prerequisites other than the requirement of a final judgment on the merits. Accordingly,

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[10] In the district court, the male guards apparently did not argue that the requirements of an "identity of issues" and a "full and fair opportunity to litigate their claim" had not been satisfied. Hence, it is understandable that the district court would not address these factors. See App. at 100.

the district court focused its attention exclusively on this issue.

On appeal, however, the male guards not only challenge the existence of the requisite final judgment on the merits in the Commonwealth Court, but also assert that the issues in the two suits were not identical and that they were not afforded a full and fair opportunity to litigate the issues pertinent to their Title VII claim. The Commonwealth points out--and its argument is borne out by the district court's analysis--that the only matter of contention raised by the male guards in the district court was whether the state court's judgment amounted to a judgment on the merits of the male guards' sex discrimination claim. The Commonwealth now argues that the male guards are barred from raising the issues that they failed to contest below.

We agree with the Commonwealth's contention but are satisfied that even had the male guards contested each of the four factors in the district court, the result would have been no different. Thus, in an excess of caution, we will briefly consider each factor seriatim, bearing in mind that we are under no obligation to do so.[11]

A. Identity of the Issues

The male guards contend on appeal that the issues before the arbitrator and the Commonwealth Court were distinct from the issues relevant to their Title VII claim and thus issue preclusion could not stand as an

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[11] Neither in the district court nor before us have the male guards challenged the element of issue preclusion involving "identity of the persons." This requirement clearly has been met. Moreover, we need not address any contention that there was no identity of the causes of action in the state and federal proceedings because "cause of action" identity is not a requirement of issue preclusion.

obstacle to their federal suit. The thrust of the male guards' argument is that an arbitrator's role in construing a collective bargaining agreement is too circumscribed to form a basis for the preclusion of their subsequent Title VII claim.

Under Pennsylvania law, "review of [an] arbitrator's finding is limited to whether the decision draws its essence from the collective bargaining agreement." Neshaminy Fed. of Teachers v. School Dist., 501 Pa. 534, 540, 462 A.2d 629, 632 (1983); Scranton Federation of Teachers v. Scranton School District, 498 Pa. 58, 64, 444 A.2d 1144, 1146 (1982); Association of Pennsylvania St. Coll. and University Faculties v. Pennsylvania, 496 Pa. 239, 242-43, 436 A.2d 987, 989 (1981). Thus, an arbitrator's award must be upheld by a reviewing state court whenever "'the interpretation can in any rational way be

derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention...'" Neshaminy Fed. of Teachers, 501 Pa. at 541, 462 A.2d at 632 (quoting Community College of Beaver County v. Community College of Beaver County, Society of the Faculty, 473 Pa. 576, 593-94, 375 A.2d 1267, 1275 (1977) quoting Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1129 (3d Cir. 1969))). On the basis of this standard, the male guards argue that the district court should not have given preclusive effect to the Commonwealth Court's decision.

The flaw in the male guard's argument is that it fails to take into account the manner in which both the arbitrator and the Commonwealth Court grafted classic Title VII BFOQ analysis onto their respective interpretations of the agreement. As

discussed above, Typescript at 6-9 supra, both the arbitrator and the Commonwealth Court identified the contract issue as "whether the gender distinction made by the Department in its advertisements for shift vacancies could be justified as a BFOQ." The arbitrator answered this question in the negative, concluding that the "[p]rivacy rights of the inmates is not a justification for a BFOQ exception to the general prohibition of discrimination on the basis of sex." Commonwealth Dept. of Corrections, 101 Pa.Commw. at ____, 515 A.2d at 1002. On appeal, the Commonwealth Court disagreed and answered that same question in the affirmative. It held that female gender was indeed a BFOQ for the jobs at issue in this case. Thus, it is beyond dispute that the issue throughout both proceedings prior to the institution of the instant federal suit was

whether female gender was a BFOQ for the positions being advertised at SCI-Muncy.

The district court correctly recognized that the merits of the male guards' Title VII claim critically hinged on whether gender was a BFOQ for the vacant guard positions at SCI-Muncy. App. at 101. Indeed, Title VII provides, in relevant part, that:

> ... it shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of... sex... where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise...

42 U.S.C. § 2000e-2(e)(1) (emphasis added). Given Title VII's explicit recognition of the BFOQ exception to the statute's proscription of gender-based discrimination, there can be little doubt that the issue identified in the arbitration, and decided by the Commonwealth Court, as well as the issue before the district court, were all identical--i.e.,

whether being a female was a BFOQ for the guard jobs available at SCI-Muncy.

B. Full and Fair Opportunity to Litigate

The male guards' claim that they were denied a full and fair opportunity to litigate their Title VII claim also fails. Allen v. McCurry warns that "collateral estoppel [issue preclusion] cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the issue in the earlier case." 449 U.S. at 95; Kremer, 456 U.S. at 480-81; Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971); Boileau v. Bethlehem Steel Corp., 730 F.2d 929, 935 (3d Cir.) (per curiam), cert. denied, 469 U.S. 871 (1984). While the Supreme Court has repeatedly expressed the "full and fair opportunity"

requirement, it has "not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate." Kremer, 456 U.S. at 481. The Kremer court did, however, state that for purposes of 28 U.S.C § 1738, a "full and fair opportunity" will be presumed whenever "state proceedings... satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." 456 U.S. at 481 (emphasis added).

Under this admittedly general standard, we have no doubt that the male guards were afforded a full and fair opportunity to press their discrimination claim in the Commonwealth Court. As indicated above, both the arbitrator and the Commonwealth Court sought to answer the sole question of whether female gender was a BFOQ for the job vacancies in question. There is no claim of procedural

deficiencies in the record, nor is there any contention that the male guards were deprived of their procedural due process rights by either of the tribunals below. As we read the record, a BFOQ analysis was undertaken by both the arbitrator and the state court. Nothing in the record suggests that the male guards have been deprived either of their right to submit evidence or their right to an impartial hearing with respect to this issue.[12] See Carter v. City of Emporia, Kan., 815 F.2d 617 621 (10th Cir. 1987).

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[12]The male guards place great stock in Bottini v. Sadore Management Corp., 764 F.2d 116 (2d Cir. 1985), which they assert supports the principle that arbitration proceedings are never entitled to preclusive value in subsequent Title VII actions, even where a state court has reviewed the arbitrator's decision. Bottini involved a building superintendent who was discharged for unsatisfactory job performance, due, at least in part, to his absence from work on Sunday mornings while attending meetings of the Jehovah Witnesses. An arbitrator subsequently

C. Judgment on the Merits

The male guards argue before us, as they did in the district court, that the Commonwealth Court's decision should not be viewed as a judgment on the merits of their discrimination claim and thus should not

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found good cause for the discharge and ordered Bottini to vacate his free apartment within 30 days. Bottini challenged the arbitrator's decision in state court. After his petition was denied, Bottini brought no further appeal. The landlord obtained a warrant for Bottini's eviction. Bottini then commenced a Title VII action in federal district court, alleging discrimination. That action was dismissed on res judicata grounds. On appeal, the Second Circuit reversed, holding that the state proceedings did not constitute a judgment on the merits of Bottini's Title VII action, and did not afford Bottini a full and fair opportunity to litigate his Title VII claim.

Even if we were bound by the holding in Bottini, which of course we are not, we would not find it apposite because of the significant distinctions between Bottini and the instant case. Unlike the arbitration and the Commonwealth Court proceedings in the instant case--each of which analyzed and dealt head on with the dispositive BFOQ issue--neither of the state court decisions in

prevent them from challenging SCI-Muncy's hiring policies as discriminatory. As we have earlier noted, this was the only issue

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Bottini addressed Bottini's discrimination claims. Indeed, Bottini's discrimination claim had not been presented to either of the state tribunals. Moreover, unlike the instant case, the Second Circuit in Bottini, applying New York law, held that in all events, preclusion was unavailable because neither of the state courts involved had the authority or the jurisdiction to review the discrimination claims. Thus, Bottini lends no support to the male guards' claim here.

The Seventh Circuit's holding in Kirk v. Bremen Comm. High Sch. Dist. Bd. of Educ., 811 F.2d 347 (7th Cir. 1987), upon which the male guards also rely, is similarly inapposite. In Kirk, the Court held that a state court's decision which did not address Kirk's discrimination claim did not preclude his subsequent Title VII action. Kirk involved a male high school instructor who was laid off as part of a reduction in force, while a number of female instructors with less seniority were retained. The high school's justification for its departure from seniority was Kirk's inability to supervise female high school students in the females' locker room. Although the facts of Kirk are similar in some respects to the facts of the instant case, Kirk is inapposite because there the state court never addressed Kirk's discrimination

preclusion factor challenged in the district court.

The male guards' primary contention is that the Commonwealth Court dealt exclusively with the arbitrator's failure to properly interpret the collective bargaining agreement and thus never fully considered whether, in fact, female gender is a BFOQ under Title VII. See Appellant's Reply Brief at 9. More specifically, the male guards reason that, because the Commonwealth Court overturned the arbitrator's decision on the basis that he exceeded his authority by relying on the Title VII analysis in Griffin v. Michigan Dept. of Corrections, 30 Fair Empl. Prac. Cas. (BNA)

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claim and thus decided no issue that was asserted in Kirk's subsequent Title VII suit. Hence, unlike the instant case in which the BFOQ question was presented and decided in state court, in Kirk no basis existed for claim or issue preclusion as a result of the state court's action.

638 (E.D.Mich. 1982), the Commonwealth Court itself never adjudicated the merits of their discrimination claim.

This argument would be compelling if the Commonwealth Court had limited its review solely to whether the arbitrator had properly applied the principles of contract interpretation. However, as we read the Commonwealth Court's opinion, its judgment was derived, in large part, from an independent analysis of the BFOQ question. See Commonwealth Dept. of Corrections, 101 Pa. Commw. at ____, 525 A.2d at 102-03. Whether the Commonwealth Court exceeded its authority by straying beyond the confines of its proper standard of review is not for us to decide. Indeed, the only court with jurisdiction to address that question in the Pennsylvania Supreme Court. Thus, the male guards' contention, which we believe can only result

from a "crabbed and unduly technical reading of the Commonwealth Court's opinion, "Davis, 688 F.2d at 173, is simply inconsistent with the Commonwealth Court's analysis.

A nearly identical argument was considered and rejected by the Kremer court. Kremer argued that the New York Supreme Court's decision affirming the New York Human Rights Division's dismissal of his discrimination claim should not be viewed as a decision on the merits of his claim because the state court's standard of review was whether the Human Rights Division's decision was arbitrary and capricious. The Supreme Court nevertheless construed the state court's affirmance of Kremer's dismissal as a decision that the claim lacked merit as a matter of law. See Kremer, 456 U.S. at 480 n.21.

The court's holding in Davis v. United States Steel Supply, 688 F.2d 166, is also

instructive. In Davis, Thelma Davis, a black woman, filed an administrative action with the City of Pittsburgh Commission on Human Relations, alleging that her discharge by U.S. Steel was the result of racial discrimination. After the Commission had decided in Davis' favor, U.S. Steel appealed to a state court which held that there was insufficient evidence in the record to support the Commission's conclusion. Thereafter, Davis commenced an action in federal district court claiming a violation of 42 U.S.C. § 1981. Citing the Supreme Court's decision in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), we held in banc that Davis' claim under § 1981 was precluded by the prior state proceedings.

In that case, Davis argued that the state court's review of the Commission on Human Relations' decision should not be viewed as a

judgment on the merits of her § 1981 claim. The Pennsylvania state court had held that "none of the [Commission's] findings is sufficient to support the Commissioner's conclusions' that U.S. Steel discriminated against her in violation of the [relevant] Pittsburgh ordinance...." Davis, 688 F.2d at 173. Although the state court never directly addressed the issue of whether U.S. Steel, in fact, had discriminated against Davis, we nevertheless held that, "[w]hatever language the [Commonwealth] court utilized, the court clearly concluded that the findings and record in the case were inadequate to support the conclusion that U.S. Steel had discriminated against Davis because of her race." Id.

Similarly, we believe that, whatever else the Commonwealth Court may have considered in the instant case, it clearly considered and disposed of the merits that gave rise to this

dispute by holding, as it did, that female gender is a BFOQ for monitoring female inmates.

IV.

The male guards also suggest that the Supreme Court's decisions in Kremer, 456 U.S. 461 (1982) and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) militate against giving preclusive effect to the Commonwealth Court's decision, even if all of the requirements of issue preclusion have been met. We cannot agree. As our discussion has shown, Kremer supports our conclusion that preclusive effect must be given to the Commonwealth Court's determination. Alexander, on the other hand, is a vastly different case than the case presently before us.

In Alexander, Harrell Alexander, Sr., a black, was discharged from his position as a

drill operator for producing too many defective parts. He thereafter filed a grievance under the anti-discrimination clause of a collective bargaining agreement between the company and his union, which was rejected. Upon rejection, an arbitration hearing was held at which the arbitrator ruled that Alexander's racial discrimination claim was meritless and that his discharge was for cause. Alexander then filed a Title VII claim in district court, which was dismissed as res judicata. On certiorari to the Supreme Court, the Court framed the issue before it as being "under what circumstances, if any, an employee's statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." Alexander, 415 U.S. at 38. After a lengthy discussion of

purposes underlying Title VII, the Court concluded that an unreviewed arbitration decision was not entitled to preclusive effect in a subsequent Title VII action. It reached this result, in substantial part, because endowing an arbitration decision with preclusive weight would deprive a plaintiff of the type of process envisioned by Title VII, and in particular, of the full array of protections and practices available in a court of record. See id. at 56-60.

The distinction between our case and Alexander is immediately apparent. While it is true that the Supreme Court has consistently held that an unreviewed arbitration decision does not preclude a federal court action, see, e.g., McDonald v. City of West Branch, 466 U.S. 284, 288 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 742-45 (1981); Alexander,

415 U.S. at 56-60; cf. University of Texas v. Elliot, 106 S.Ct. 3220, 3223 (1986), the Supreme Court has distinguished between those cases and cases in which an intervening state court proceeding reviewed a state agency's decision prior to the commencement of a federal action.[13] See Kremer, 456 U.S. 461; see generally, J. Cook & J. Sobieski, Civil Rights Actions, ¶ 3.22, 3-212-16 (1987).

In the latter instance, the Supreme Court has allowed preclusion of the subsequent federal suit on the theory that state court proceedings provide greater protection than arbitration proceedings and thus are to be given preclusive effect under 28 U.S.C. § 1738 when the requirements of claim or issue preclusion have been met. See Kremer, 456 U.S.

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[13]The Supreme Court has not directly addressed the issue of whether an arbitrator's decision that has been reviewed by a state court is entitled to preclusive effect.

at 476-85. Accordingly, this court subsequently interpreted Kremer's mandate as requiring federal courts to give preclusive effect to state court judgments, so long as the state's res judicata requirements have been satisfied. See Gregory v. Chebi, No. 87-1222, slip op.; Davis, 688 F.2d 166.

In Gregory, James Gregory, a police officer, was discharged from his position after allegedly violating departmental rules. Gregory's dismissal was thereafter reviewed by a township council pursuant to the Local Agency Law, 2 Pa.Cons.Stat.Ann. § 752 (Purdon Supp. 1987), and the Police Tenure Act, 53 Pa.Stat.Ann. tit. § 811 (Purdon 1974). After conducting hearings, the council determined that Gregory's dismissal was justified. Gregory then appealed to a Pennsylvania Court of Common Pleas, naming the township and the township council members as defendants. After

delineating its standard of review as "limited to a determination of whether the ...[council] abused its discretion, committed an error of law, or violated any constitutional rights." Gregory, slip op. at 6, the Common Pleas Court upheld Gregory's discharge.

As is true of the male guards in the present case, Gregory did not appeal the Common Pleas Court decision to a higher state court but instead filed a suit in federal court. Gregory's federal suit included additional defendants and prayers for relief, as well as new previously unasserted, constitutional claims. Despite the various additions to Gregory's suit, the district court held that his due process claim predicated on the denial of his first amendment rights was precluded by res judicata.

We affirmed the district court's holding on the ground that the essence of Gregory's state and federal claims was that he had been unlawfully discharged from his employment. Noting that Gregory's federal claims encompassed additional defendants and entitled him to forms of relief not available in the prior state proceedings, we nevertheless upheld the district court stating that Gregory "had but one cause of action for wrongful discharge, even if different forms of relief were available and varying theories of constitutional and statutory violations potentially were applicable. The claim asserted by [Gregory] in both state and federal courts remains indivisible, and thus satisfies the second condition [identity of causes of action] for claim preclusion." Id. at 17.

While both Gregory and Davis (discussed earlier, Typescript at 26 supra) utilized issue preclusion as such, their analyses of claim preclusion so closely track the analysis required for issue preclusion that in the context of the present case, no meaningful difference can be found. Here, the BFOQ issue is so inextricably intertwined with the cause of action presented in both the state and federal proceedings, we are satisfied that both Gregory and Davis dictate the result which we reach.[14]

In Davis, we stated:

> A single cause of action may comprise claims under a number of different statutory and common law

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[14]As suggested by the majority in Davis, the doctrines of claim preclusion and issue preclusion will often apply to the same set of facts. Although the Davis court relied on claim preclusion, it stated that even if claim preclusion could somehow be shown not to apply, "the Commonwealth Court's conclusion that U.S. Steel had not been shown to have

> grounds. Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims... In both her state and federal proceedings, Davis sought redress for her treatment at the hands of U.S. Steel on ground that the treatment was racially discriminatory and therefore illegal.

Davis, 688 F.2d at 170.

Here, as in Gregory and Davis, the underlying event giving substance to the claim of discrimination has uniformly and

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acted with a racially discriminatory motive still would constitute collateral estoppel [issue preclusion] against a similar allegation in a § 1981 action. As long as the Pennsylvania procedures were fair and adequate under 28 U.S.C. § 1738, Davis would 'at least [be] estopped from relitigating the issue of employment discrimination arising from the same events.'" Davis, 688 F.2d at 173 N.8 (quoting Kremer, 456 U.S. at 482 n.22.). Because we are satisfied that in the present case the Commonwealth Court decided that in this context female gender constitutes a BFOQ, the male guards are, at the very least, "estopped from relitigating" this issue.

consistently been the same. That very issue, i.e., the issue of the existence of BFOQ, has been tried and decided, albeit by a state court. We have been directed to no authority which would permit the male guards to retry that issue de novo in a different forum. Thus, we are satisfied that the analyses, the reasoning, and the holdings of Kremer, Elliot, Davis and Gregory clearly require that a federal discrimination action should be precluded by a prior state court proceeding between the same parties when the state proceeding has decided the same issues of discrimination on the merits.

V.

The district court's Order of June 22, 1987, dismissing the Title VII Count (Count

II) of the male guards' complaint, will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

BARRY L. RIDER, ET AL.,

JUDGMENT IN A CIVIL CASE

v.

CASE NUMBER:

COMMONWEALTH OF PENNSYLVANIA, et al.,

CV. 86-1536

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendants and against the Plaintiffs on Count II of the Complaint.

June 22, 1987

DONALD R. BERRY
Clerk

SYLVIA LEHOTSKY
(by) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BARRY L. RIDER, et al.,:		
Plaintiffs	:	Civil No. 86-1536
vs.	:	Complaint Filed 10/27/86
COMMONWEALTH OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

ORDER
June 22, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Male employees of the State Correctional Institution at Muncy, Pennsylvania, filed this action claiming that they have been discriminated against on the basis of sex in violation of the Equal Pay Act, 29 U.S.C. § 206, et seq.; Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972 (hereinafter Title VII), 42 U.S.C. § 2000e, et seq.; 42 U.S.C. § 1983; and Pennsylvania state law. By order

of May 20, 1987, this Court dismissed the Plaintiffs' claims pursuant to Title VII on the ground that the decision of the Commonwealth Court of Pennsylvania in Commonwealth, Department of Corrections vs. American Federation of State, County, & Municipal Employees, 515 A.2d 1000 (Pa. Comwlth. 1986) precluded the Plaintiffs from relitigating whether sex was a bona fide occupational qualification for certain positions certified and advertised for females only at the State Correctional Institution at Muncy, Pennsylvania.

On June 19, 1987, the Plaintiffs filed a motion requesting that we enter final judgment in favor of the Defendants and against the Plaintiffs on Count II of the complaint which seeks relief pursuant to Title VII to enable them to file an appeal in the Court of Appeals for the Third Circuit. The Defendants concur

in the motion. In it the Plaintiffs state that this Court did not discuss three United States Supreme Court cases which were cited by the Plaintiffs in their brief in opposition to the motion to dismiss: Alexander vs. Gardner-Denver Company, 415 U.S. 36 (1974); Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); McDonald vs. City of West Branch Mich., 466 U.S. 284 (1984). We thoroughly reviewed and considered those cases; they were not cited or discussed because we were of the view that they were completely inapplicable to this case. We do not deem it advisable to discuss all cases cited in briefs and particularly those which we determine to be inapposite. The above cited cases stand for the general proposition that an arbitrator's award or decision does not preclude a subsequent suit in federal court. The decision in Commonwealth,

Department of Corrections vs. American Federation of State, County & Municipal Employees, 515 A.2d 1000 (Pa. Comwlth. 1986) is a decision of the Commonwealth Court of Pennsylvania, not of an arbitrator and the decisions cited thus have no bearing in our view. For that reason, we determined that under Commonwealth_Department_of_Corrections, the Plaintiffs were precluded from litigating a claim pursuant to Title VII.

To order entry of judgment on one claim of a multiclaim lawsuit requires that we make an "... express determination that there is no just reason for delay...." Fed.R.Civ.P. 54(b). The major claim in this lawsuit is the Title VII claim, and thus the interests of the litigants will best be served by the entry of judgment at this time. There is no just reason to delay the entry of judgment.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Plaintiffs' motion for judgment filed June 19, 1987, is granted.

2. The Clerk of Court shall enter judgment in favor of the Defendants and against the Plaintiffs on Count II of the Complaint.

MUIR, U.S. District Judge

MM:tb

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BARRY L. RIDER, et al.,:		
Plaintiffs	:	Civil No. 86-1536
vs.	:	Complaint Filed 10/27/86
COMMONWEALTH OF PENNSYLVANIA, et al.,	:	(Judge Muir)
Defendants	:	

ORDER
May 20, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Male employees of the State Correctional Institution at Muncy, Pennsylvania, (hereinafter Muncy) filed this action claiming that they have been discriminated against on the basis of sex in violation of the Equal Pay Act, 29 U.S.C. § 206, et seq., Title VII, 42 U.S.C. § 2000e, et seq., 42 U.S.C. § 1983, and Pennsylvania state law.

Presently ripe for disposition is the motion of the Defendants to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Following the filing of the brief in support of the motion to dismiss, counsel met, discussed the issues raised therein, and agreed to dismissal of numerous claims in the complaint. By order of April 21, 1987, we dismissed those portions stipulated to by counsel. We now consider the disputed areas.

When considering a motion to dismiss, the complaint must be liberally construed and viewed in the light most favorable to the Plaintiff. Gomez vs. Toledo, 446 U.S. 635, 636 n. 3 (1980); Jennings vs. Shuman, 567 F.2d 1213, 1216 (3d Cir. 1977). The factual allegations contained in the complaint and every deducible inference therefrom must be accepted as true for the purposes of this motion. United States vs. Mississippi, 380

U.S. 128 (1965). We should not dismiss the Plaintiffs' complaint at the pleading stage unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. Conley vs. Gibson, 335 U.S. 41, 45-46 (1975); Robb vs. Philadelphia, 733 F.2d 236 (3d Cir. 1984).

Viewing the allegations of the complaint as true and construing them in the light most favorable to the Plaintiffs, the following facts must be accepted. The State Correctional Institution at Muncy, Pennsylvania, houses predominantly female prisoners. Certain positions within the institution are available only to female employees. Announcements posted to solicit applications for vacancies have stated "C.O.I. VACANCY--FEMALE" and "All Female C.O.I.'s

should place their bid in the box located in the control center..."

The Pennsylvania Civil Service Commission is authorized to certify positions as female only when it finds that this job condition is a bond fide occupational qualification. The civil service positions at Muncy which are available to female employees only have been so certified by the Civil Service Commission.

The Plaintiffs assert that the practice of limiting some positions to female employees discriminates against male employees because it effectively denies them promotions and equal pay. They further contend that their efforts to obtain equality have resulted in threats and retaliatory action on behalf of the Defendants.

The Defendants argue that the decision of the Commonwealth Court of Pennsylvania in Com., Dept. of Corrections vs. Amer. Fed. of

St., Cnty., and Mun. Employees, 515 A.2d 1000 (Pa. Cmwlth. 1986), precludes the Plaintiffs from challenging the sex-based hiring practices at Muncy pursuant to Title VII, the Equal Pay Act or 42 U.S.C. § 1983 under the principles of res judicata and collateral estoppel.

In Com._Dept._of_Corrections, two guards at Muncy filed grievances concerning the policy of making certain shift openings available only to female employees. They argued that the policy violated the provisions of their collective bargaining agreement with the Department of Corrections which provided that (1) preference for job assignments and openings would be made on the basis of seniority unless operational necessities required otherwise and that (2) employees would not be discriminated against on the basis of, inter_alia, sex. An arbitrator

found that the sex-based hiring practices at Muncy violated the challenged provisions of the collective bargaining agreement and made an award which required that all prison guard shift assignments be made without regard to gender. The arbitrator determined that a guard's gender was not a bona fide occupational qualification. He rejected the position of the Department of Corrections that female prisoners have personal privacy rights insofar as states of undress and the performance of intimate bodily functions in the presence of guards of the opposite sex. Com., Dept. of Corrections, vs. Amer. Fed. of St., Cnty., and Mun. Employees, 515 A.2d at 1002. The Department of Corrections appealed to the Commonwealth Court of Pennsylvania. The Court vacated the arbitrator's award finding that it was not rationally derived from the essence of the collective bargaining

agreement. The Court reasoned that "... the prison management could not have intended to bargain away its absolute responsibility to award prisoners such vestige of human status as is embodied in personal privacy," Id. at 1003, when it agreed not to discriminate on the basis of sex and to grant shift openings on the basis of seniority unless operational necessities required otherwise.

We must give the same preclusive effect to the judgment in Com. v. Dept. of Corrections, that would be given by the Courts of the Commonwealth of Pennsylvania. Kremer vs. Chemical Const. Corp., 456 U.S. 461, 466 (1982); 28 U.S.C. § 1738. Under Pennsylvania law, a court's decision on an issue of fact or of law which is necessary to its judgment is conclusive with respect to that issue in a subsequent suit. See, e.g., Jordan vs. Hartford Sterling Company, 350 Pa. 277, 286

(1944). The doctrine of collateral estoppel applies in Pennsylvania when (1) the issue decided in the prior litigation is identical to the issue in the present litigation, (2) the prior litigation resulted in a final judgment on the merits, (3) the party against whom the estoppel is asserted is a party or in privity with a party to the prior proceeding and (4) the party against whom the estoppel is asserted had a full and fair opportunity to present the claim in the prior action. Safeguard Mutual Ins. Co. vs. Williams, 463 Pa. 567, 574 (1975).

The Plaintiffs appear to agree that the issue in Com. Dept. of Corrections was whether the male employees were discriminated against by the sex-based hiring policy, that the employees in Com. Dept. of Corrections are in privity with the Plaintiffs and that the employees in Com. Dept. of Corrections

had a full and fair opportunity to present their claims to the Court. The Plaintiffs argue, however, that the decision in *Com. Dept. of Corrections* did not result in a judgment on the merits and thus does not preclude them from challenging the sex-based hiring practices at Muncy. They contend that the Commonwealth Court found solely that the arbitrator's decision was not rationally derived from the essence of the collective bargaining agreement.

The Defendants assert that although the decision in *Com. Dept. of Corrections* involved a dispute under a collective bargaining agreement, the Court had to make a factual finding that sex is a bona fide occupational qualification for some positions at Muncy in order to resolve the dispute. The Defendants contend that such a finding defeats the Plaintiffs' claim that the sex based

hiring policy violates Title VII, the Equal Pay Act, and 42 U.S.C. § 1983.

Title VII, 42 U.S.C. § 2000e, et seq., provides in relevant part that:

> ... it shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of... sex... where... sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...

42 U.S.C. § 2000e-2(e)(1). Thus, if the Court in Com. Dept. of Corrections, found that sex was a bona fide occupational qualification for the positions certified and advertised for females only at Muncy, then we are precluded from relitigating that issue and insofar as the complaint seeks relief pursuant to Title VII, it must be dismissed.

We recognize that Com. Dept. of Corrections, involved an interpretation of the collective bargaining agreement as well as

consideration of the sex-based hiring practices of which the Plaintiffs complain. Having carefully reviewed the Com. Dept. of Corrections case we conclude that the Commonwealth Court could not have determined that the award of the arbitrator was not based on the essence of the collective bargaining agreement without also deciding that sex is a bona fide occupational qualification for the positions certified and advertised for females only at Muncy. We are particularly persuaded by the Court's references to the institution's responsibility to deal with the prisoners humanely and accord them some minimal level of privacy. The Court stated that "... the essence of the contract being interpreted here is not to operate an institution which treats prisoners as if they were less than human, like inmates of a concentration camp, deprived even of that minimal degree of personal

privacy which the common opinion of civilized communities recognizes to be the entitlement of every person." Com._Dept._of_Corrections, at 1003. Because the Commonwealth Court in Com._Dept._of_Corrections found that sex is a bona fide occupational qualification attendant to the positions certified for females only at Muncy, the Plaintiffs are estopped from challenging the sex-based hiring practices at Muncy under Title VII. Therefore, insofar as the complaint seeks relief pursuant to Title VII, it will be dismissed.

We question whether the Plaintiffs are similarly estopped from challenging the sex-based hiring practices by the decision in Com._Dept._of_Corrections under the Equal Pay Act, 42 U.S.C. § 1983, and Pennsylvania state law. These causes of action appear to be directly linked to the challenge brought under Title VII. Nevertheless, we shall hold in

abeyance our ruling as to whether the complaint states a claim under the remaining causes of action and allow the Plaintiffs to file an amended complaint complete within itself and without reference to the previously filed complaint but limited to the causes of action remaining in the complaint.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion to dismiss Count II of the complaint is granted.

2. The Plaintiffs may file an amended complaint complete within itself and without reference to the prior complaint but limited to the claims remaining in the complaint filed on October 27, 1987, within 30 days of the date of this order.

3. Failure to file an amended complaint may result in dismissal of this case.

MUIR, U.S. District Judge

MM:tb

COMMONWEALTH COURT OF PENNSYLVANIA

NO. 326 C.D. 1986

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS,
STATE CORRECTIONAL INSTITUTION
AT MUNCY,

Petitioner

vs.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 13, AFL-CIO,

Respondent

Argued, September 11, 1986

BEFORE: CRAIG, COLINS and PALLADINO, JJ.

(Decided September 30, 1986)

CRAIG, Judge.

Where a labor arbitrator's award requires a state correctional institution to make all prison guard shift assignments without regard to the gender of the prison guards and hence regardless of the personal privacy of inmates in the presence of guards of the opposite sex, is the arbitrator's award

invalid as not rationally derived from the essence of the provisions of the collective bargaining agreement relating to the prison's operation?

The Pennsylvania Department of Corrections has appealed from the award of a labor arbitrator upholding two grievances of corrections officers (guards) at the State Correctional Institution at Muncy, which houses approximately 400 female prisoners and 140 male prisoners and is the only state facility for female prisoners.

The grievances protested the failure of the employer to allow bids for shift preferences in accordance with Article 30, Section 10 of the agreement which states:

> In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it is necessary to assign otherwise in order to protect the efficiency of operation. Seniority status in this regard shall be Classification

seniority attained at the work site.

The agreement further provides under Article 33, Discrimination:

> Both the Employer and the Union agree not to discriminate against any employee on the basis of race, creed, color, ancestry, sex, marital status, age, national origin, non-job related handicap or disability, union membership or political affiliation.

The arbitrator's findings of fact, which are not substantially in dispute in any respect, establish that the department's shift vacancy announcements at issue, posted in January and February of 1984, were labeled "C.O.I. VACANCY--FEMALE" and addressed to "All Female C.O.I.'s." After the department declined to permit male guards to bid on specific assignments, and after the rejection of the resulting grievances at initial steps, the parties submitted the grievances to the arbitrator.

The arbitrator found that the women prisoners live in eight large two-story housing units in two-person rooms, with a shower room on each floor, having two or three separate shower stalls; at least one recreational room is located in each women's building. Male prisoners reside in two single-story structures, each with a large open dormitory room, a shower room and a small recreation room.

Heretofore, the department staffed female housing units with female guards and male housing units by male guards. However, as the arbitrator found, since 1981 the department has had in effect for the prison a policy statement which declares that a guard's gender will not exclude the employee from employment nor from particular assignments except where sex is a bond fide occupational qualification. Summarized, specific policy guidelines state:

a. Guards will not be assigned to work in open view of unclothed inmates of the opposite sex.

b. External escort of prisoners must be by at least one officer of the same sex;

c. Assignments to housing units will involve at least one officer of the same sex as the inmates; and

d. Guards will not conduct strip or frisk searches of inmates of the opposite sex except in case of emergency.

Because of the express gender labeling of the shift bid announcements, the arbitrator correctly concluded that the grievants had established a prima facie case of sex discrimination. He acknowledged that, under the department's guidelines, both male and female officers qualify for assignments on all shifts and may work with inmates of the opposite sex when more than one officer is present. He also correctly noted that the primary consideration is not whether men and

women guards are eligible for several respective assignments in any shift, but rather the point is that men or women officers are being excluded from certain shift assignments on the basis of their gender.

The key issue, as the arbitrator stated it at the outset, was whether the distinction made by the department in the shift assignments was based upon a bona fide occupational qualification. Stated as a contract interpretation question, the issue is whether the department could depart from seniority as the sole criterion "in order to protect the efficiency of operation." Art. 30, sec. 10, quoted above.

The arbitrator acknowledged the decision of the United States Supreme Court in Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), in which the Court declined to invalidate a state regulation

barring the hiring of women guards in contact positions at all-male prisons, concluding that gender was a bona fide occupational qualification in the circumstances of that case, which involved a danger of violence against women guards, threatening the control of the prison.

However, because the evidence in this case did not exhibit any special threat of violence against either male or female guards in this prison, the arbitrator decided that a guard's gender was not a bona fide occupational qualification rejecting the department's position that personal privacy concerns of inmates, with respect to states of undress and the performance of intimate bodily function in the presence of guards of the opposite sex, had a meaningful relationship to the selection of guards. The arbitrator found legal support--and apparently also a factual

foundation--for that determination in Griffin v. Michigan Department of Corrections, 30 Fair Empl.Prac.Cas. (BNA) 638 (E.D.Mich.1982). In that case, the U.S. District Court for the Eastern District of Michigan rejected the claim of the prison management defendants that inmate privacy is a factor creating a bona fide occupational qualification, stating:

> Defendants' argument is without merit because (1) it assumes that inmates retain an unqualified protected right of privacy under the Constitution, and (2) it is based on stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing of a member of one's own sex. Neither assumption can withstand traditional scrutiny.
>
> ....
>
> Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex. The entire basis of the argument rests on assumptions and stereotypical

> sexual characteristics which have been expressly prohibited by Title VII, Dothard, supra, and other Supreme Court decisions that refute principals [sic] of sexual stereotyping.

30 Fair Empl.Prac.Cas. (BNA) at 646-48. Accordingly, the arbitrator here, in arriving at the award, stated his rationale as follows:

> Privacy rights of inmates is not a justification for a BFOQ exception to the general prohibition of discrimination on the basis of sex. It follows, therefore, that the Employer's attempt to draw a delicate balance between the inmates' rights of privacy and the employees' rights under the Agreement has no basis in law.

In so doing, the arbitrator departed from his own sound articulation of the issue, as noted above, and reached his conclusion on the basis of a different issue--balancing the rights of inmates against the rights of guards--which is not involved in the case. The interpretation issue for the arbitrator here was, as he initially recognized, whether the department

had a basis for deeming it necessary to depart from seniority "in order to protect the efficiency of operation." With respect to resolving that issue, the arbitrator strayed from the essence of this contract and from the issue at hand, to import into the case the philosophical views of a federal trial court, whose position is neither binding nor necessarily persuasive with respect to the law of this Commonwealth. As this court has stated in an opinion by President Judge Crumlish:

> Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex.

Philadelphia v. Human Relations Commission, 7 Pa.Commonwealth Ct. 500, 510 n. 7, 300 A.2d 97, 103 n. 7 (1973).

The essence of this contract involves the operation of a correctional institution having a legal responsibility as a public agency to deal with its inmate population effectively, efficiently and humanely. The essence of the contract being interpreted here is not to operate an institution which treats prisoners as if they were less than human, like inmates of a concentration camp, deprived even of that minimal degree of personal privacy which the common opinion of civilized communities recognizes to be the entitlement of every person.

The irrationality of this award cannot withstand even the limited scope of review accorded to the appellate courts in these cases. In Community College of Beaver County

vs. Community College of Beaver County Society of the Faculty, 473 Pa. 576, 375 A.2d 1267 (1977), the Pennsylvania Supreme Court reiterated that an arbitrator's award is to be respected by the judiciary

> if 'the interpretation can in any rational way be derived form the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention...' Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1129 (3d Cir. 1969). It was this approach which was meant to be suggested by the brief statement in International Brotherhood of Firemen and Oilers, supra, that 'the arbitrator's interpretation of the contract must be upheld if it is a reasonable one.' 465 Pa. at 366, 350 A.2d at 809.

473 Pa. at 594, 375 A.2d at 1275.

In accordance with the equating of the rational derivation essence test with the reasonableness language of International Brotherhood of Firemen and Oilers, 465 Pa. 356, 350 A.2d 804 (1976), the Pennsylvania

Supreme Court, in Philadelphia Housing Authority v. Union of Security Officers No. 1, 500 Pa. 213, 216, 455 A.2d 625, 627 (1983), overturned an arbitrator's award reinstating a housing authority security officer who had been discharged for defrauding an elderly tenant. Condemning the irrationality of condoning such conduct in relation to the essence of the collective bargaining agreement, the Supreme Court decided that

> it is manifestly unreasonable to conclude that the Housing Authority could have intended to bargain away its absolute responsibility to insure the integrity of its housing security force by discharging an officer who had defrauded one of the very people whom he is paid to protect.

The Supreme Court thus concluded that the arbitrator was without authority to overturn the discharge because the arbitrator's decision was "unjustified by any terms that were or could properly have been contemplated

by the parties...." 500 Pa. at 216, 455 A.2d at 627.

Similarly here, it is manifestly unreasonable to conclude that prison management could have intended to bargain away its absolute responsibility to accord to prisoners such vestige of human status as is embodied in personal privacy.

The award of the arbitrator here, not being rationally derived from the essence of the contract and its purpose, must be vacated.

ORDER

NOW, September 30, 1986, the arbitrator's award dated January 13, 1986, is vacated.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 87-5492

RIDER, Barry L., CHARLES, Kenneth L., FOUST, Alan L., ELLIS, Stephen, KEEN, Stephen F., LARISON, Ronald E., MARKLEY, Joseph P., MILLER, Donald R. Jr., SINGER, Blaine L., SMITH, Clare, Executrix of the Estate of Leonard Smith, SMITH, LaRue D., THOMAS, Daniel H., TRUTT, Blaine A., WILLIAMS, John Thomas and VETTER, Jon F., individually and on behalf of all other similarly situated,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA; JEFFES, Glenn R., Commissioner of PA Bureau of Corrections; PENNSYLVANIA BUREAU OF CORRECTIONS; GOOLSBY, Ann M., Superintendent of Muncy Correctional Institution, ANDREWS, J.L., Personnel Officer of Muncy Correctional Institution, MILLETT, John E., Executive Director PA Civil Service Commission; PENNSYLVANIA CIVIL SERVICE COMMISSION

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C.No. 86-1536)

Present: SEITZ, SCIRICA and GARTH, Circuit Judges

J_U_D_G_M_E_N_T

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel January 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 22, 1987, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
Sally Mrvos, Clerk

June 23, 1988

Certified as a true copy and issued in lieu of a formal mandate on July 15, 1988.

Test: Sally Mrvos
Clerk, United States Court of Appeals
for the Third Circuit